No. 86-1712

In the Supreme Court of the United States

OCTOBER TERM, 1986

TRANSAMERICAN NATURAL GAS CORPORATION,
PETITIONER

v.

UNITED STATES DEPARTMENT OF THE INTERIOR, ET AL.

ON PETITION FOR A WRIT OF CERTIORARI TO THE TEMPORARY EMERGENCY COURT OF APPEALS OF THE UNITED STATES

BRIEF FOR THE FEDERAL RESPONDENTS IN OPPOSITION

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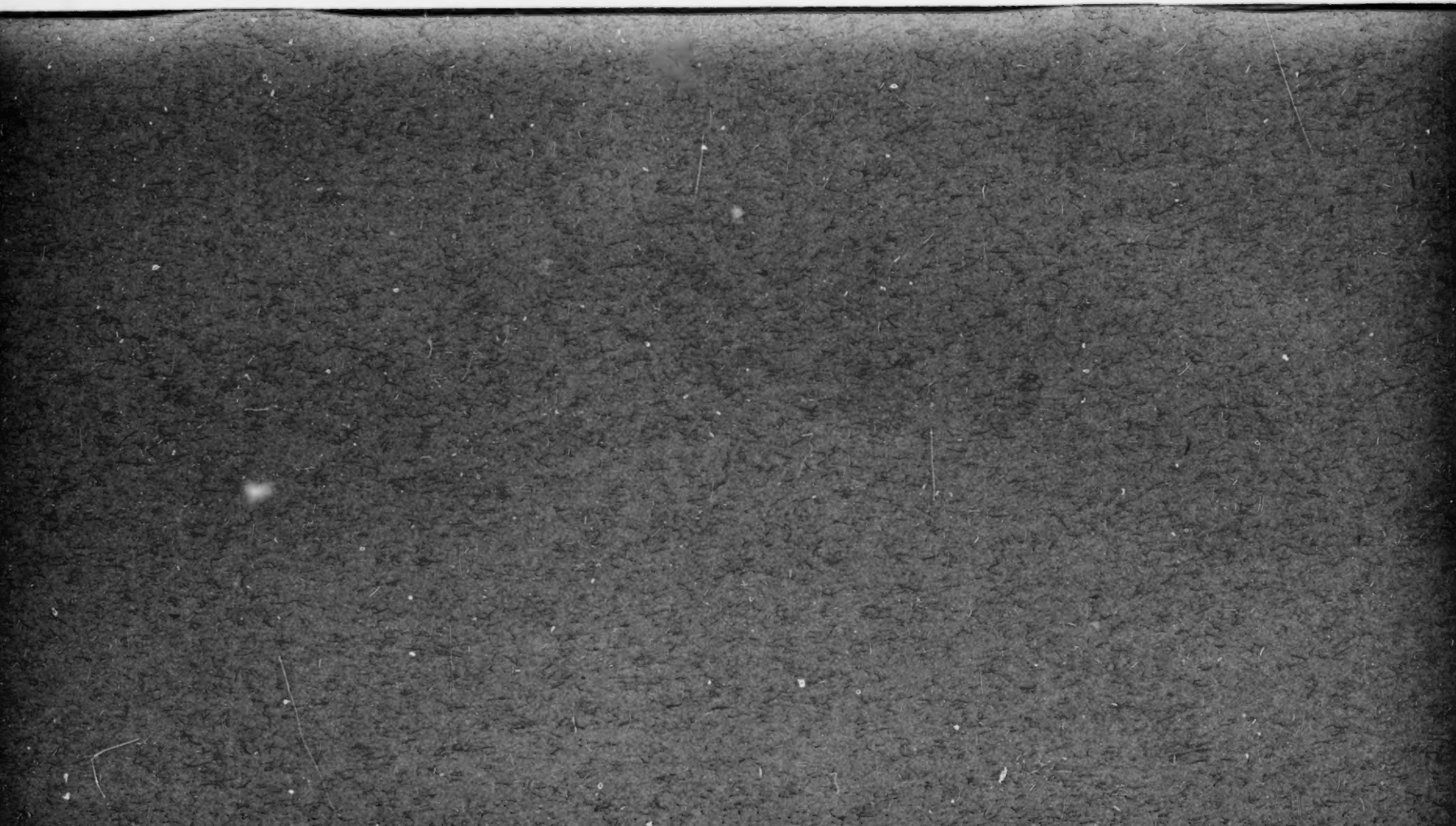

QUESTION PRESENTED

Whether sovereign immunity bars suits against the Federal government for money damages on account of alleged violations of price controls established under the Emergency Petroleum Allocation Act of 1973, 15 U.S.C. 754(a)(1), and the Economic Stabilization Act of 1970, 12 U.S.C. (1976 ed. & Supp. IV 1980) 1904 note.

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OPINION BELOW

The opinion of the court of appeals (Pet. App. 1a-10a) is reported at 816 F.2d 689.

JURISDICTION

The judgment of the court of appeals (Pet. App. 1a) was entered on March 25, 1987. The petition was

filed on April 24, 1987. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1) and under Section 211(g) of the Economic Stabilization Act of 1970 (ESA), 12 U.S.C. (1976 ed.) 1904 note, as incorporated by Section 5(a)(1) of the Emergency Petroleum Allocation Act of 1973 (EPAA), 15 U.S.C. 754(a)(1).

STATEMENT

1. The Department of the Interior grants oil and gas leases on the Outer Continental Shelf under the Outer Continental Shelf Lands Act, 43 U.S.C. (& Supp. III) 1331 *et seq.* The government retains a royalty interest in these leases, and the Secretary of the Interior is authorized to accept royalties in money or in kind. 43 U.S.C. 1353. If the Secretary elects to accept royalties in kind, the royalty oil may thereafter be sold to small independent refiners; if the Secretary makes any such sale, he must realize at least the same amount of money that the United States would have obtained if the royalties had originally been taken in cash. 43 U.S.C. 1334.

Petitioner is a small refiner of crude oil. In 1973 and 1976, petitioner entered into three contracts with the United States, through the United States Geological Survey, a sub-agency of the Department of the Interior, to purchase oil produced from offshore tracts in which the government had a royalty interest. Pet. App. 2a-3a. Until January 28, 1981, maximum prices for different categories or "tiers" of crude oil were set by the Department of Energy (DOE) through regulations promulgated under the Emergency Petroleum Allocation Act of 1973 (EPAA), 15 U.S.C. 754(a)(1), and the Economic Stabilization Act of 1970 (ESA), 12 U.S.C. (1976

ed. & Supp. IV 1980) 1904 note. See, *e.g.*, 39 Fed. Reg. 1924 (1974); 41 Fed. Reg. 4931 (1976). The regulation of petroleum pricing ended on January 28, 1981. See Exec. Order No. 12,287, 3 C.F.R. 124 (1982).

2. Petitioner brought this action against the federal respondents in the United States District Court for the Eastern District of Louisiana for a refund under Section 210 of the ESA. Petitioner claimed that the Department of the Interior had sold oil to petitioner at a price in excess of the maximum lawful price established by DOE's regulations, because it charged petitioner administrative fees and transportation costs that exceeded the regulated price. Petitioner also contended that the overcharges constituted an unlawful exaction of money for which it was entitled to restitution, and an unlawful "taking" of property in violation of the Fifth Amendment for which it was entitled to "just compensation." Pet. App. 3a.

The district court dismissed petitioner's complaint for lack of jurisdiction. The court also denied petitioner's motion to transfer its action to the United States Claims Court pursuant to 28 U.S.C. 1631. Pet. App. 3a-4a.

3. Petitioner filed notices of appeal with both the Temporary Emergency Court of Appeals (TECA) and the Fifth Circuit. The Fifth Circuit stayed its proceedings pending TECA's disposition of petitioner's appeal. Pet. App. 4a. TECA affirmed the district court's dismissal of petitioner's complaint (*id.* at 1a-10a).

Relying on its prior decision in *Lunday-Thagard Co. v. United States Dep't of Interior*, 773 F.2d 322 (1985), cert. denied, No. 85-504 (Jan. 13, 1986),

TECA reaffirmed its view that the ESA and the EPAA do not waive the federal government's sovereign immunity from suit (Pet. App. 5a). The court next rejected (*id.* at 5a-6a) petitioner's claim that the waiver of sovereign immunity in the Tucker Act (28 U.S.C. 1491) allowed petitioner to bring suit under the ESA in a federal district court. The court of appeals said (Pet. App. 5a-6a) that the Tucker Act's waiver applies only to actions within the jurisdiction of the Claims Court, which could not hear petitioner's claim because the district courts have exclusive jurisdiction over suits arising under the EPAA and ESA.

Finally, the court of appeals rejected (Pet. App. 6a-9a) petitioner's alternative argument that its takings and transportation payment claims could be heard by (and should be transferred to) the Claims Court pursuant to the Tucker Act because they are "non-EPAA" claims. The court noted that the Claims Court had recently held that it "simply lacked jurisdiction to hear claims largely dependent upon interpretation of ESA or EPAA violations, [which include] * * * cases concerning Fifth Amendment takings claims or transportation payment claims which have as a factual genesis contracts entered into under ESA and EPAA." Pet. App. 7a (citing *Tipperary Refining Co.* v. *United States*, 11 Cl. Ct. 572 (1987), appeal pending, Nos. 87-1233 & 87-1234 (Fed. Cir.)).

ARGUMENT

The decision of the court of appeals is correct and does not conflict with any decision of this Court or of any other court of appeals. Accordingly, review by this Court is not warranted.[1]

1. The court of appeals in this case simply reaffirmed its prior rulings in *Lunday-Thagard Co.* v. *United States Dep't of Interior*, *supra*, and *McCulloch Gas Processing Corp.* v. *Canadian Hidrogas Resources, Ltd.*, 577 F.2d 712, cert. denied, 439 U.S. 831 (1978), that the EPAA and the ESA do not waive the federal government's sovereign immunity from damage actions based on alleged price control violations. This Court denied petitions for a writ of certiorari on both those prior occasions, and nothing has changed since those earlier denials, nor is there anything about this particular case, to suggest that different treatment is warranted.

Petitioner maintains (Pet. 13-15) that sovereign immunity has been waived because its claims under the ESA and the EPAA fall within the "category" of claims covered by the Tucker Act. This argument lacks merit. As the court of appeals held (Pet. App. 4a-6a (emphasis omitted)), "[w]hile the Tucker Act does embody a waiver of sovereign immunity for claims against the United States committed to the

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[1] Following TECA's decision, petitioner moved to lift the stay in the Fifth Circuit and has suggested here that the Court should defer consideration of its petition pending the outcome of the Fifth Circuit appeal. We disagree. While we agree that the Fifth Circuit should lift its stay, and have moved in that court to dismiss the appeal for lack of jurisdiction, we see no reason for this Court to postpone its consideration of the petition in this case, which presents no issue warranting review by this Court.

Claims Court, Congress specifically placed jurisdiction of all EPAA and ESA claims in the district courts." There is simply no merit to petitioner's suggestion that the ESA impliedly modified the Tucker Act so as to allow suit to be brought in any district court. Certainly, petitioner has failed to identify anything in the text or legislative history of the ESA demonstrating a "clear and manifest" congressional intent to repeal the Tucker Act's jurisdictional limitations. *Kremer* v. *Chemical Constr. Corp.*, 456 U.S. 461, 468 (1982) (citation omitted).

Nor does this Court's decision in *United States* v. *Mitchell*, 463 U.S. 206 (1983), suggest otherwise. In *Mitchell*, this Court ruled only "that by giving the Court of Claims jurisdiction over specified types of claims against the United States, the Tucker Act constitutes a waiver of sovereign immunity with respect to those claims" (463 U.S. at 212 (footnote omitted)). *Mitchell* in no way supports petitioner's suggestion, correctly rejected by the court of appeals, that the Tucker Act waives sovereign immunity for claims other than those over which the Court of Claims has been given jurisdiction. Indeed, *Mitchell* implicitly rejects that notion.[2]

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[2] The court of appeals also correctly affirmed the district court's denial of petitioner's motion, in the alternative, to transfer the case to the Claims Court. The Claims Court lacks jurisdiction to hear cases arising under the ESA and the EPAA. See ESA, 211(a), 12 U.S.C. (1976 ed.) 1904 note. And, as both the court of appeals in this case and the Claims Court have ruled, a litigant cannot escape the jurisdictional bar merely by couching what is essentially a claim arising under the ESA and the EPAA as a "taking" claim. See Pet. App. 6a-8a; *Tipperary Refining Co.* v. *United States*, 11 Cl. Ct. 572, 576-577 (1987).

2. Contrary to petitioner's contention (Pet. 11-13), review by this Court is not required "to reconcile disharmonious decisions of the federal courts concerning their respective jurisdictions to hear petitioner's claims." As illustrated by this case, the district courts, Claims Court, TECA, and Fifth Circuit have thus far successfully defined their respective jurisdictions to avoid unnecessary interference and duplication of effort. For instance, the Claims Court does not assert jurisdiction over claims, such as those raised in this case, grounded in the ESA and EPAA (see note 2, *supra*), and the Fifth Circuit properly stayed its proceedings in this case—over petitioner's objection—to avoid any interference with TECA's jurisdiction. Hence, contrary to petitioner's suggestion (Pet. 13), there are currently no "boundary disputes" for this Court to resolve or "unclaimed territories" for this Court to award.

3. Finally, petitioner argues (Pet. 10-11) that review is warranted because the issue presented by the petition is important. The question presented, however, is at best of historical, not current, importance. TECA's decision in this case involves price controls that terminated in January 1981. The predominant federal energy policy since the decontrol of the price of oil has been "to wind up regulation of the oil industry." *Johnson Oil Co.* v. *DOE*, 690 F.2d 191, 196 (Temp. Emer. Ct. App. 1982). Most of the previously filed overcharge claims against Interior have already been resolved, and new claims are barred by the applicable statute of limitations (see Pet. App. 4a n.3).[3] Petitioner's representation (Pet. 10-11) of the

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[3] Indeed, as we argued in the court of appeals, petitioner's claims are precluded by the applicable limitations period (see Pet. App. 4a n.3). Although the court of appeals did not reach

amount potentially at stake in this case fails to take account of either the previously-resolved claims or the expiration of the limitations period and therefore is grossly overstated.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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the limitations issue, the court suggested in dictum that the action "would seem" to be barred by the statute of limitations (*ibid.*).

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